FILED
JAN 14 1883

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
vs.
LAWRENCE S. BABBITT.
} No. 1073.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This case is submitted upon the Opinion of the learned court below, contained in the record.

S. F. PHILLIPS,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

No. 1,073.

THE UNITED STATES, APPELLANT,

vs.

LAWRENCE S. BABBITT, APPELLEE.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLEE,

BY

W. PENN. CLARKE,

Attorney for Appellee.

WASHINGTON CITY, D. C.,

PRINTED BY JOHN L. GINCK,

1881.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

THE UNITED STATES
vs.
LAWRENCE S. BABBITT. } No. 1073.

Appeal from the Court of Claims.

FINDINGS OF FACT BY THE COURT OF CLAIMS.

I.

The claimant reported at the Military Academy at West Point as a candidate for admission June 11, 1857, and was admited as a conditional cadet July 1, 1857, and received his warrant as a cadet on the 6th of February, 1858.

II.

On the 1st of July, 1857, when the said claimant was so admitted as a conditional cadet, he entered into an agreement, as required by law, in the words and figures following, to wit:

"UNITED STATES MILITARY ACADEMY.
"*West Point, N. Y., July* 1, 1857.

"I, Lawrence S. Babbitt, appointed at large, aged eighteen years four months, having been selected for an appointment as cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent author-

ity; and I, Lawrence S. Babbitt, do solemnly swear that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever, and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

"LAWRENCE S. BABBITT.

"Sworn and subscribed to at West Point, New York, this sixth day of February, eighteen hundred and fifty-eight, before me.

"CHAS. DRAKE,
"*Clerk of Orange County.*"

III.

The said claimant remained at said institution from the said 11th day of June, 1857, performing all the duties enjoined upon him by law, or imposed by his superior officers, until the 1st day of July, 1861, when he was duly graduated from said Academy; and, thereupon, he was duly appointed and commissioned by the President of the United States a second lieutenant in the Third Regiment of Artillery of the United States, which commission bears date on the 24th day of June, 1861; and on the 3d of March, 1863, he was duly appointed and commissioned by the President of the United States a first lieutenant of Ordnance; and on the 22d day of December, 1866, he was in like manner appointed and commissioned a captain of Ordnance; and on the 10th day of May, 1878, he was in like manner appointed and commissioned a major of Ordnance, which position he now holds, and is performing the duties thereof. He duly accepted the promotions herein stated, and faithfully discharged the duties they imposed upon him, and his said several commissions bear date as herein stated. Since the said 11th day of June, 1857, he has remained continuously in the service of the United States, in a military capacity, and discharged the various duties imposed upon him by law in the different positions to which he has been promoted.

IV.

Prior to and since 1858 each person appointed a cadet at the United States Military Academy received a written

paper, signed by the Secretary of War, which was as follows, the blanks being filled by the name of the person appointed and with the appropriate dates:

"*To whom it may concern:*

"Know ye that the President has been pleased to appoint —— ——— a cadet of the United States Miltary Academy, to rank as such from the —— day of ———, 18—.

"Given under my hand and seal, at the War Department, this —— day of ———, in the year of our Lord 18—, and of the Independence of the United States the ——.

"——— ———,
"*Secretary of War.*"

Claimant received a document written and executed in the above form when he entered the United States Military Academy in 1858.

V.

If the period during which the claimant was a cadet at West Point is to be regarded in the computation of longevity pay, the claimant is entitled to judgment for $536.47, in addition to the compensation which he has already received; otherwise his petition should be dismissed.

CONCLUSION OF LAW.

On the foregoing facts the court decides, as conclusion of law, that the claimant's petition should be dismissed. But it appearing that the amount in controversy in this case does not exceed $3,000; and that the claimant's counsel moves for the entry of a *pro forma* judgment in the claimant's favor, and that the Assistant Attorney-General assents thereto, the court, notwithstanding said decision, orders judgment to be entered in the claimant's favor for $536.47.

BRIEF FOR THE APPELLEE.

From the facts found by the court, it appears that the claimant entered the military service of the United States on the 12th day of June, A. D. 1857, as a cadet at West Point, and that he has remained continuously in such service from that period up to the present, and is still in said service. During the time included between these dates, he has risen in rank from second lieutenant to that of major of Ordnance, which position he now holds, and he has thus been continuously in the military service of the United States for over twenty years.

The 24th section of the act of Congress of July 15, 1870 (Rev. Stats., sec. 1261, page 219), fixes the pay of the commissioned officers of the army, and provides further, that "there shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank and pay, *ten per centum of their current yearly pay for each term of five years service;*" but "the total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." Rev. Stats., secs. 1263, 1264. These provisions of the statute provide for what is known in the army as longevity pay; and the 7th section of the act of June 18, 1878, entitled "an act making appropriations for the support of the army for the fiscal year ending June 30, 1879, and for other purposes," provides as follows:

"SECTION 7. That on and after the passage of this act, all officers of the army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full

time they may have served as such officers and as such enlisted men, in computing their service for longevity pay and retirement." U. S. Stats., 1877–8, page 150.

The questions in this case arise under this 7th section of the act of June 18, 1878, and upon its construction depends the claimant's right to recover. The act itself is not only an act making appropriations for the support of the army, but it contains other provisions for the government of the military establishment of the United States, and is a general law upon the subject. The army of the United States is divided into two great classes or divisions, viz, officers and soldiers or "enlisted men," which embraces privates and non-commissioned officers; and every one in the army proper belongs to one or the other of the grand divisions. The "Articles of War" (Rev. Stats., sec. 1342), expressly defines the meaning of the terms *officer* and *soldier*, as follows:

"The word officer, as used therein (the Articles of War) shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men; and the convictions mentioned therein shall be understood to be convictions by court-martial."

This is the language of the act of April 10, 1806, and the distinction then established has been uniformly obtained throughout in all the laws relating to the army which have been enacted since. In construing the act of 1878, we must bear this distinction in mind. The 7th section provides for the two classes of men who constitute the army. By the first clause, "all officers of the army of the United States, *who have served as officers in the volunteer forces during the war of the rebellion*," are provided for. It is well known that after the close of the war, many of the officers of the volunteers were transferred to

the regular army, and became officers therein, and it was the purpose of Congress, by the enactment of this provision, to enable them in computing their length of service in the army, both for the purpose of longevity pay and retirement, to include the time they had served in the volunteer force. Thus under this provision of the statute, a volunteer officer in the war of the rebellion, transferred to the regular army, in computing his time of service, was authorized to include in it the period he had served as a volunteer in the suppression of the rebellion, and if he had served five years in the volunteer force before he was transferred to the regular army, he was entitled to the ten per centum of his yearly pay, or what is known as longevity pay.

The second clause of the section was intended for the benefit of enlisted men, who had served in the regular or volunteer service, and who had been appointed commissioned officers in the regular army. In this clause the phrase "during the war of the rebellion" is omitted, and any enlisted man who had served in the regular or volunteer force of the army, and had subsequently been promoted to be a commissioned officer of the regular army, was entitled in computing his period of service, to include the time he had served as such enlisted man.

Having thus stated what I believe to be the true construction of section 7 of the act of July 18, 1878, and which alone can carry into effect the evident intention of the law-making power, I am brought to the main question in this case, and that question is this: Is the claimant in this case included within the provisions of this section; or, in other words, *in computing his longevity pay, or his right to retirement, is he authorized by this section of the statute to include the period of time he was in the military service of the United States as a cadet at the Military Academy at West Point?*

The solution of this question can only be reached by the

determination of two others, viz: 1. Is the Military Academy at West Point a part of the army of the United States; and 2. Is a cadet at that institution in the army of the United States, and if so, in what capacity?

1. *Is the Military Academy a part of the army of the United States?* A reference to the laws regulating the institution will determine this question in the affirmative. The act of March 16, 1802, which is entitled "*an act fixing the Military and Peace Establishment of the United States*," provided for the creation of a military academy at West Point and the very title of the act shows that it was designed to be a part of the military establishment of the United States. Rev. Stat., Sec. 1309. The act of April 29, 1812, made further provision for the Academy, provided for an increase in the number of cadets, their organization into companies, and defined the duties entailed upon them. Dunlop's Laws of the U. S., 474. And it also required each cadet, with the consent of his parent or guardian, to sign articles by which he engaged to serve five years, unless sooner discharged. The act of July 5, 1838, entitled "An act to increase the present military establishment of the United States, and for other purposes," still further recognized the academy as a part of the army by providing that the cadets hereafter admitted, shall engage to serve eight years, unless sooner discharged, thus increasing the term of service three years. Dunlop, 949. And finally, the act of July 28, 1866, which is entitled "An act to increase and fix the Military Peace Establishment of the United States," in its first section provides as follows:

"That the Military Peace Establishment of the United States shall hereafter consist of five regiments of artillery, ten regiments of cavalry, forty-five regiments of infantry, *the professors and corps of cadets of the United States Military Academy*, and such other forces as shall be provided for by this act, *to be known as the army of the United States*."

The substance of this act, which is still in force, will be found in the Revised Statutes, section 1094, though the title is omitted. This is conclusive, and establishes the proposition that the Military Academy is a portion of the army of the United States, as much so as any regiment doing duty in the field.

2. The second interrogatory, viz.: Is a cadet at that institution *in* the army; and if so, in what capacity? and particularly the last branch of it, is perhaps more difficult of solution; but an examination of the statutes regulating the appointment and duties of cadets will establish conclusively, in my judgment, the position they occupy in that institution. Being *in* the army, the cadets must belong to one or the other of the two great divisions into which the army is divided. They are either commissioned officers or soldiers. All men in the army performing military service must be embraced under one of these heads. The laws recognize no other distinctions. Cadets are clearly not officers, for the simple reason that they are not appointed in the manner prescribed by law for the appointment of commissioned officers, and they receive and hold no commissions. To constitute a person an officer in the army, he must be appointed to the position by the President, be confirmed by the Senate, and these acts must be evidenced by the issuance to him of a commission attesting these facts. All these acts must have transpired before any one can exercise power in the army as a commissioned officer. Cases have occurred where commissions have been withheld from persons who were appointed to the army by the President and confirmed by the Senate; the commissions were withheld for good and sufficient reasons appearing to the Executive; and in all these cases it was held that the person so appointed and confirmed, but lacking a commission, was not a legal officer of the army. It is clear, then, that cadets are not officers. I am aware that Caleb Cushing, when Attorney-General, endeavored to ob-

viate the difficulty which is presented, by denominating the cadets *quasi* officers; but no such officer is known to the law, and the position was so ridiculous, that no subsequent Attorney-General has ventured to refer to it approvingly.

Cadets at West Point, then, being in the army, and not being officers, must necessarily belong to the other grand division of which the army is composed, viz.: *Soldiers.* And they are soldiers for the following reasons:

I. They are, in the language of the 7th section of the act of June 18, 1878, "enlisted men."

II. While at the Academy they perform the duties of common or private soldiers.

III. They are governed by the rules and articles of war, and are subject to be tried by court martial, in like manner as other soldiers.

IV. They are subject to the orders of the President of the United States, as commander-in-chief, and may be ordered into the field as other forces are

V. They are entitled to pensions for wounds or other disabilities incurred in the line of duty, as other soldiers are.

Let us now turn to the statutes, and see how far I am sustained in these positions by the law.

1. *That the cadets at the Military Academy are "enlisted men."*

The first mention of cadets in the military service of the United States, is made in the act of May 9, 1794, entitled "an act providing for raising and organizing a Corps of Artillerists and Engineers," the third section of which reads as follows:

"That the organization of the corps be as herein mentioned, to wit: One lieutenant-colonel commandant, one adjutant, one surgeon, four battalions, each to consist of one major, one adjutant and paymaster, and one surgeon's mate: and four companies, each to consist of one captain, two second lieutenants, *two cadets, with the pay, clothing and rations of a sergeant*," &c. 1 U. S. at Large, 366.

The sixth section of the act July 16, 1798, which was an act to increase the army and regulating the pay thereof, provided "that the monthly pay of the non-commissioned officers, musicians and privates, * * * shall be as follows: *Cadets*, ten dollars and two rations per day," &c. These two acts—the one creating the cadet and the other regulating his pay—the first which appear in our statutes, it will be seen, place the cadet in the grade of enlisted men, and as we progress, it will be apparent that no subsequent enactment has changed that position. The act of March 16, 1802, an act to fix the military peace establishment, located the Corps of Engineers at West Point, and provided for an increase of the number of cadets, but it made no change in their *legal status*. The act of January 11, 1812—enacted during the war with England—provided for raising an additional military force, which included twenty-four cadets, who were to "receive the like pay, forage, rations and clothing and other emoluments" as those of the then military service; and they were to be governed by the rules and articles of war. 2 Stat. at Large, 671.

The Military Academy as it at present exists, was really created by the act of April 29, 1812, entitled "An act making further provision for the Corps of Engineers," the third section of which provided as follows:

"SEC. 3. That the cadets heretofore appointed in the service of the United States, whether of artillery, cavalry, riflemen or infantry, or that may in future be appointed as hereinafter pro-

vided, shall at no time exceed two hundred and fifty; that they may be attached at the discretion of the President of the United States, as students to the Military Academy, and be subject to the established regulations thereof; that they shall be arranged into companies of non-commissioned officers and privates, according to the directions of the commandant of engineers, and be officered from the same corps for the purposes of military instruction; that there shall be added to each company of cadets four musicians; and the said corps shall be trained and taught all the duties of a private, non-commissioned officer, and officer; be encamped at least three months of each year, and taught all the duties incident to a regular camp; that the candidates for cadets be not under the age of fourteen, nor above the age of twenty-one years; that each cadet previously to his appointment by the President of the United States, shall be well versed in reading, writing and arithmetic; *and that he shall sign articles*, with the consent of his parent or guardian, *by which he shall engage to serve five years*, unless sooner discharged; and all such cadets shall be entitled to and receive the pay and emoluments now allowed by law to the corps of engineers."

The act of July 5, 1838, increased the term of service to eight years. (Rev. Stat., Sec. 1321.) And this requirement is still in force, and every person who is admitted as a cadet at West Point enters into this contract.

Even if no written contract was entered into by each cadet, he would be considered, under the rulings of the War Department, as an enlisted man. Upon this subject, Winthrop's "Digest of the Opinions of the Judge Advocate-General of the Army," page 248, says: "Our law not defining enlistment, nor designating what proceeding or proceedings shall or may constitute an enlistment, it may be said in general, that any act or acts which indicate an undertaking on the part of a person legally competent to do so, to render military service to the United States for the term required by the existing law, and an acceptance of such service on the part of the

Government, may ordinarily be regarded as legal evidence of a contract of enlistment between the parties, and as equivalent to a formal written agreement, when no such agreement has been had." * * * "But," says the same author, "enlistments in our army are *now* almost invariably evidenced by a *formal* writing and engagement under oath," *thus treating the contract into which the West Point cadet enters as an enlistment.*

And what is the execution of this contract into which the cadet enters, but an *enlistment*—an absolute engagement to serve the government in a military capacity for the term of eight years? Webster defines the word *enlist* as follows: "1. To enroll, to register, to enter a name on the list. 2. To engage in public service, by entering the name in a register, as an officer enlists men. 3. To engage in public service by subscribing articles or enrolling one's name." The word *enlisted* is thus defined: "Enrolled for service, chiefly military," and *enlistment* is "the writing by which a soldier is bound." James, in his Military Dictionary, an old English authority, defines *enlistment* as "the act of taking bounty and enlisting for a soldier, on limited or unlimited service." And the authorities cited by the court in its opinion, give the word a similar definition. Thus, in the English Cyclopedia, enlistment is defined to be a voluntary engagement to serve as a private soldier for a certain number of years, while Chambers says it is the mode by which the English army is supplied with troops as distinguished from the conscription prevailing in many other countries. And Littre, the French authority, is to the same effect. We thus perceive that the definition of enlistment is the same in both military and common parlance, and means no more than the contract by which the party who executes it binds himself to serve the government as a soldier, or in a military capacity. It is well known that the *curriculum*, or course of study at the Military Academy covers but a

period of four years, and the cadets are expected to have completed their studies and to be able to graduate at the end of that period ; yet they are absolutely bound to serve the government for eight years ; they may be kept in the military service for that length of time ; and their absence from that service without leave, subjects them upon conviction to the punishment imposed for desertion. And like any other soldier, the cadet upon his admission to West Point, takes an oath that he will bear true allegiance to the United States, and that he will obey the orders of his superior officers and the rules and articles of war. The cadet is thus placed precisely upon the same footing as any other enlisted man in the army, is governed by the same rules, subject to the same duties, and liable to the same punishments in case of disobedience of orders. The position of a commissioned officer is entirely different. He enters into no contract of service with the government. He is not bound to serve for any definite period. He may refuse a commission when tendered, or, if accepted, he may resign it when so inclined, and herein lies one of the great distinctions between an officer and a soldier, as those terms are defined and understood by the Articles of War.

The position of the West Point cadet in the army is analagous to that of the medical cadets provided for by the act entitled "An act providing for the better organization of the Military Establishment," approved August 3, 1861, the fifth section of which provided as follows :

"That there be added to the medical staff of the army, a corps of medical cadets, whose duty it shall be to act as dressers in the general hospitals, and as ambulance attendants in the field, under the direction and control of the medical officers alone. They shall have the same rank and pay as the military cadets at West Point. Their number shall be regulated by the exigencies of the service, at no time to exceed fifty. It

shall be composed of young men of liberal education, students of medicine, between the ages of eighteen and twenty-three, who have been reading medicine for two years, and have attended at least one course of lectures in a medical college. They shall enlist for one year, and be subject to the rules and article of war."

Under this section the Judge Advocate-General decided that the medical cadets, though not private soldiers nor non-commissioned officers, were clearly *enlisted men;* and, therefore, that officers now in the army who had served as medical cadets during the war, were entitled under the provisions of section 7 of the act of June 18, 1878, to compute the period of such service in computing their longevity pay. Winthrop's Opinions, 367. It would seem to be clear, then, that the medical cadets were entitled to the same *rank* and pay as the West Point cadets. Their rank and pay are fixed by the statute, and if the rank thus conferred upon them is only that of *enlisted men*, as the War Department has decided, it necessarily follows, as an inevitable conclusion, that the rank of the West Point cadet is also that of an enlisted man, and nothing more.

Section 4 of article II of the Army Regulations for 1863, shows that cadets, whether those of West Point or medical cadets, are ranked as non-commissioned officers, *who are always enlisted men*, and section 1320 points out the manner in which medical cadets may be enlisted, and requires them to take an oath similar to that required of the West Point cadet, while section 80 shows that the former receive a warrant similar to that issued to the latter. The West Point cadet and the medical cadets are placed in the army on precisely the same footing ; they occupy the same grade, and are entitled to the same rank ; and the fact that officers of the medical service, who have served as medical cadets, count such service *now* in computing their longevity pay, demonstrates that the West Point cadet is entitled to the same privilege, unless it was

the intention of Congress to discriminate against the latter, for which no satisfactory reason can be given. And to abolish this discrimination was undoubtedly the object of the enactment of section 7 of the act of June 18, 1878, and the act of February 24, 1881, to which I shall refer before I close this argument.

It may be claimed, however, that if a cadet is nothing but an enlisted man, that any one so disposed may go and enlist, and thus become a cadet. But this position is fallacious, and there are two conclusive answers to it. In the first place, the law does not permit every person so inclined to become a soldier. A candidate for admission to the army, even as a common soldier, must possess certain requisites before he can be accepted. He must be an unmarried man, be of the requisite height and age, and be sound physically. Rev. Stats., secs. 1116–1118. Adj. Gen Orders, Feb. 18, 1867. And any "officer who knowingly enlists or musters into the military service any minor over the age of sixteen years, without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct. Rev. Stats., sec. 1342, Art. 3. In the second place, the Corps of Cadets is limited to one from each Congressional district, one from each Territory, one from the District of Columbia, and ten from the United States at large. The number being thus limited, some method had to be adopted in their selection, in order that all sections of the Union might be represented at the Academy. Though the President makes the appointments, all of the cadets, except those at large, are required to be actual residents of the district from which they are appointed, and they are, in fact, named by the

representative of the district. Rev. Stats., sec. 1315. But the appointment of a cadet by the President, after all, *confers no right*. His admission to the Academy depends entirely upon himself. As in the case of the ordinary soldier, he must pass the required examination, and possess the physical and educational qualifications which the law demands. After all this, if he refuses to sign the articles of service, or declines to take the oath of allegiance, he is refused admission to the Academy, and dismissed the service. Rev. Stats., secs. 1320–1. But the difference in the manner of recruiting for cadets at West Point and for common soldiers, if any such distinction exists in military law or practice, plays no part in the *status* of the cadet or the soldier, after he is in the army—that is determined by the law by which he is governed; and I have shown, I think, that the effect of the enlistment of each is to place them precisely in the same attitude, that of soldiers, in the restricted sense in which that word is used in the articles of war.

II. *While at the Academy, Cadets perform the duties of common or private Soldiers.*

It has become an axiom in almost every profession or occupation, that whoever would be successful in it, and competent to teach it, must himself have been taught it thoroughly and practically. The most successful military and naval commanders have been those who have gone through all grades of the profession, while many commanders have failed from lack of a thorough practical knowledge of all the details of the service. The primary object of the Military Academy is to instruct the pupils in the art of war, and to fit them, not only to command men, but to manage and direct all the details of an army. And this idea of thoroughness in the education of the cadets was early adopted by the authorities. The act of

1812, which increased the number of cadets and provided for teaching all the branches of the art of war, provided in its second section as follows:

"That they (the cadets) shall be arrayed into companies of non-commissioned officers and privates, according to the directions of the commandant of Engineers (then the rank of the commandant at West Point), and be officered from the said corps, for the purposes of military instruction; that there shall be added to each company four musicians; and the said corps shall be trained and taught all the duties of a private, non-commissioned officer, and officer; be encamped at least three months of each year, and taught all the duties incident to a regular camp." Dunlop, 474.

This provision of the statute of 1812 was transplanted into the Revised Statutes (sec. 1322), and is in force at the present time, and shows that at that early date in the history of the Academy, the cadets were regarded as "enlisted men," required to perform the duties of private soldiers, and honored with the positions of non-commissioned officers, which are only conferred upon enlisted men, just as they are to-day. And they are classed as troops in the Army Register. See Register of 1880, p. 272.

III. *Cadets are governed by the Articles of War, and are subject to be tried by court-martial, in like manner as other Soldiers.*

The rules and articles of war were enacted by Congress on the 10th of April, 1806 (Dunlop, 375), and the 96th article provided as follows:

"All officers, conductors, gunners, matrosses, drivers, *or other persons whatsoever*, receiving pay or hire in the service of the Artillery Corps of Engineers of the United States, shall by governed by the aforesaid rules and articles, and shall be subject to be tried by court-martial, in the like manner with

the officers and troops in the service of the United States." Dunlop, 386.

At the time of the enactment of this article, the West Point Academy was nothing but a school of Artillery and Engineers (see act of March 16, 1802, Dunlop, 305), and it was the purpose of Congress by this article to impress upon the institution a strictly military character, and subject all connected with it to military law. The first article expressly provided that "every officer now in the army of the United States shall, in six months from the passing of this act, and every officer who shall hereafter be appointed, shall, before he enters on the duties of his office, subscribe these rules and regulations;" yet not content with this, and to leave no doubt in relation to the military character of the West Point school, the 96th article, as above quoted, was inserted in the body of the articles. In an opinion upon this subject, Attorney-General Wirt said:

"In every instance in which Congress has impressed a military character on any body of men whom they intended to divest of the civil right of trial by jury, besides the impresment of that military character, they have uniformly and expressly declared that they should be subject to the rules and articles of war. And what is still more remarkable is, that even after the general act of 1806 had passed, declaring the rules and articles of war, and containing the permanent provision that the armies of the United States should be subject to these rules and articles, Congress, not content to leave after-raised troops to the operation of that provision, have in every instance repeated the provision of their subjection to military law." 1st Opin. of Atty. Gen., 276.

And Col. Robt. N. Scott, in his "Analytical Digest of the Military Laws of the United States" page 280, says:

"That Congress deemed it necessary in all cases of increase, and even in reductions, of the army, to provide that the forces

added or retained, should be subject to this military code, is apparent also from most of the legislation subsequent to date of Mr. Wirt's opinion. Under the act of July 29, 1861, this subjection has been declared in express terms, and in that act, the additional forces were placed 'on the same footing in every respect' with the corresponding grades and corps now in the regular service."

It appears from these authorities, then, that the purpose of Congress, in the enactment of the 96th article of war, was not only to impress the military character upon the institution at West Point, but in unequivocal language to subject every one connected with it to the harsh terms of that stern code, thereby depriving them of the constitutional right of the trial by jury, and making them liable to punishment upon conviction by courts-martial for any violation of military law. And this continued to be the law, until the passage of the act of 1861, the 8th section of which, in view of the rebellion against the government, which was then in progress, provided as follows:

"That all cadets now in the service, or hereafter entering the Military Academy at West Point, shall be called on to take and subscribe the following oath: 'I, A. B., do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States paramount to any and all allegiance, sovereignty or fealty I may owe to any State, county or country, whatsoever; *and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States.*' And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service." Rev. Stats., sec. 1320.

Here we see that the cadets are not only required by law to obey the rules and articles of war, but that since 1861, they have been obliged to give a personal pledge,

under oath, to such obedience. By these rules and articles of war, as I have shown, cadets are liable to "be tried by courts-martial, in the like manner with the officers and troops in the service of the United States," and the jurisdiction to which they are liable shows the position or grade they occupy in the army. The articles of war provide for two kinds of court-martial, viz., general courts-martial and regimental or garrison courts, and also courts of inquiry. Commissioned officers can only be tried by general courts-martial, *while soldiers or enlisted men are always tried by garrison or regimental courts*, except in cases where the offences are serious in their character, involving capital or other severe punishments. The latter courts are only prohibited from trying commissioned officers and capital cases, and their power to punish is limited to inflicting a fine not exceeding one month's pay, or to imprisonment at hard labor of any non-commissioned officer or soldier for a longer period than one month. Courts of inquiry are never ordered except upon the demand of the officer or soldier whose conduct is complained of, and it merely inquires into the facts, giving no opinion upon the merits of the case, unless especially ordered to do so. The provisions regulating courts-martial, and defining their powers and duties, will be found in the Rev. Stats., vol. 1, page 228, and I need not occupy time in quoting them here. The significant fact, and this is the point I am seeking to establish, is *that cadets at West Point are always triable by garrison or regimental courts-martial*, when charged with a violation of the articles of war, or the rules of the institution, thus showing that their grade in the army is that of a soldier or enlisted man, which are synonymous terms, and if they are not soldiers, but officers, then every such court-martial is absolutely void. This has been the practice since the organization of the Academy, and it must be regarded as a construction by the War Department, long adhered to, and which it is now too late to overturn,

of the military status of the cadet. In truth, the Academy is entirely governed by the articles of war, and by regulations prescribed by the Secretary of War, which in no way conflict with them; and if these articles were abrogated, its management would be without legal control. These articles are devised for the government of camps and garrisons, as well as soldiers in the field, and West Point is nothing but a garrison, and the provisions they contain for the government of soldiers, are required to be observed and obeyed by the cadets at West Point. Let us see, then, what some of these provisions are, the violation of which subjects the soldier to punishment. Thus:

"ART. 32. Any soldier who absents himself from his troop, battery, company or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

"ART. 34. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court martial shall direct.

"ART. 35. Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of the offence."

And there are others of a similar character, which are enforced against the cadets at West Point, as they are against the common or private soldier in camp or garrison, the violation of which subjects them to punishment; and their enforcement shows that the cadets have always been regarded, since the Academy was established, as soldiers or enlisted men. And it may properly be assumed that if they were regarded as "warrant officers," as Mr. Cushing designated them in an opinion to which I shall refer hereafter, or occupied a position in the army of a higher grade than enlisted men, they would not be liable to punishments for a violation of duty, which are only inflicted upon common soldiers.

IV. *The Cadets are subject to the orders of the President of the United States, as commander-in-chief, and may be ordered into the field as other military forces are.*

The law is explicit upon this point. The act of 1802, which created the Military Academy, expressly provided that the officers and cadets should, "be subject at all times to do duty in such places, and on such service as the President of the United States shall direct." Dunlop, 305. And section 1323 of the Revised Statutes, says: "Cadets shall be subject at all times to do duty in such places and on such service as the President may direct." Who doubts that under these provisions of the statute, the President, in case of invasion or insurrection or any other great emergency, may order the corps of cadets into the field for military service, as he might any regiment or other organized portion of the army of the United States, and that when thus ordered, they would be bound to obey, and perform the duty required, or else be guilty of a violation of military law? In fact, it is a matter of common knowledge that the cadets have been placed upon duty temporarily elsewhere than at West Point. We know that in 1876 the corps was ordered to Philadelphia, and that it performed service at the Centennial Exposition, in guarding public property, the cadets standing guard and otherwise acting as soldiers; and we know also, that upon one occasion, at least, it was ordered to the National Capital, and performed escort duty at the inauguration of a President. If they may be ordered to such service as this, they may also be required to march and fight in defence of their country, and such duty is within the contemplation of law.

V. *They are entitled to pensions for wounds or other disabilities incurred in the line of duty, as other soldiers are.*

The 14th section of the act of March 16, 1802, an act fixing the military and peace establshment of the United States, and which provided the foundation for the present Military Academy, reads as follows:

"SEC. 14. That if any officer, non-commissioned officer, musician or private in the corps composing the peace establishment, shall be disabled by wounds or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pay and under such regulations, as may be directed by the President of the United States for the time being: *Provided always*, That the compensation to be allowed for such wounds or disabilities to a commissioned officer, shall not exceed for the highest rate of disability half the monthly pay of such officer, at the time of his being disabled or wounded; and that no officer shall receive more than the half-pay of a lieutenant-colonel; and that the rate of compensation to non-commissioned officers, musicians and privates shall not exceed five dollars per month: *And provided also*, That all inferior disabilities shall entitle the person so disabled to receive an allowance proportionate to the highest disability." Dunlop, 304.

In 1820, Attorney-General Wirt decided that under this act, and the subsequent statutes of April 29, 1812, and March 3, 1815, cadets of the military academy who had been, or may be wounded or disabled whilst in the line of their duty, were entitled to be placed upon the pension rolls of the United States as other soldiers are. This section of the act of 1802 was substantially transferred to the act of July 14, 1862, relating to pensions, and made applicable to all disabilities by reason of wounds or disease contracted in the service since the 4th of March, 1861, and substantially the same provisions are incorporated in, and constitute sections 4692 and 4693 of the Revised Statutes It may, therefore, be confidently contended that at present, as in 1802, cadets are regarded by the law as soldiers, and in case of disability in the line of their duty, are entitled to pension precisely as other soldiers are.

Here then, is a body of men who are *in* and a part *of* the army of the United States, so declared by law, who have contracted to serve the government for a given term of years in a military capacity; who are not officers, for

they have neither been appointed nor commissioned as the law requires; who are governed by the Articles of War, and subject to the penalties those regulations inflict; who are organized into companies and are required to perform all the duties of soldiers; who may be ordered into the field, and compelled to serve in the defense of their country, or the protection of its government, as other soldiers do; and who are entitled to pensions in case of disability in the line of duty—and to say, that under these conditions, they are not to be ranked as soldiers or "enlisted men," which, in the Articles of War mean the same thing, is to establish an anomaly in military affairs which has no parallel in any other government, and which violates all the traditions of the War Department, which has always treated the cadets of the Military Academy as enlisted men.

Until a recent date the opinions of the Law Department of the Government have been in consonance with this view. In the year 1819, Attorney-General Wirt gave the earliest decision upon this question on record, in an exhaustive opinion. The question submitted to him by the Secretary of War, is not stated in the opinion, but is evident from the whole tenor and effect of it. It was a review of the decision of some court-martial, affecting the military *status* of a cadet in the army of the United States, and after reciting and reviewing all the statutes bearing upon the subject, the Attorney-General decides that *cadets are soldiers*, receiving the pay of soldiers, and bound to perform military duty in such places and on such service as the commander-in-chief shall order; and that the corps to which they are attached is a part of the military peace establishment. He closes the opinion with the following language:

"It is suggested by Col. Hindman, on behalf of the court-martial, that these cadets are merely students. In one sense they are so; and so was the old corps, known under the name

of Artillerists and Engineers, so was the original corps of Engineers, who constituted the Military Academy. For both, books, instruments, and apparatus for study were expressly provided by law; yet this character of students did not exempt them from a liability to martial law. But if the suggestion is intended to place these cadets on the footing of civil students, clothed with all their civil privileges and immunities, it is proper to remark that these cadets occupy a very different ground. *They are enlisted soldiers;* they engage like soldiers, to serve for five years, unless sooner discharged; they receive the pay, rations, and emoluments of sergeants; they are bound to perform military duty in such places and on such service as the commander-in-chief of the Army of the United States shall order, and finally, by the act of the 3d of March, 1815, fixing 'the Military Peace Establishment of the United States,' the corps to which they are attached, and of which they form a part, is expressly recognized as a part of the military establishment." 1 Op. of Atty. Gen., 276, 290.

In 1820, the same Attorney-General, in response to the question whether cadets who are wounded in the line of their duty are entitled to pensions, answers affirmatively, holding that cadets who have been or who may be wounded whilst in the line of their duty are entitled to be placed on the list of invalids, as provided in the acts of March 16, 1802, April 29, 1812, and March 3, 1815. He says:

"The cadets thus composing a part of the corps of Engineers (referring to the provisions of the act of April 29, 1812), are embraced by every provision affecting that corps in general terms, and consequently are embraced by the provision of the 7th section of the act of the 3d of March, 1815, before cited. That section, as we have seen, is that all the corps authorized by the act (of which the corps of Engineers was one) should be entitled to the same provision for wounds and disabilties, &c., as was authorized by the act of the 16th March, 1802. The only remaining question is, whether the act thus referred to authorized pensions for wounds and disabilities?

"It is proper to observe that the reference thus made to the

act of the 16th of March, 1802, is not made for the purpose of ascertaining who was entitled to the provision for wounds and disabilities, for that was already ascertained, as we have seen, by the act of the 3d of March, 1815, itself. But the reference to the former law is made solely for the purpose of ascertaining what the provision was which was thereby made for wounds and disabilities, and on turning to the 14th section of the former law, we find it enacted that if any officer, non-commissioned officer, musician, or private in the corps composing the peace establishment, shall be disabled by wounds or otherwise, while in the line of his duty in public service, he shall be placed on the list of invalids of the United States, at such rate of pay, &c. Thus (contrary, I confess, to my impression on the first presentation of the question), I find myself brought to the conclusion that the cadets at West Point are entitled to the benefits of this provision for wounds and disabilities received in the line of duty." 1 Opp. of Atty. Gen., 348.

In 1821, Attorney-General Wirt also decided that the professors and cadets at the Military Academy, as such, are not commissioned officers within the meaning of the 64th article of the Rules and Articles of War, for the purpose of being detailed as members of general regimental courts-martial, nor can such courts be formed of professors for the trial of cadets; and also that cadets may be tried by a regimental or garrison court-martial, according to the 66th Article of War. And the reason he gives for so holding, is that cadets are not commissioned officers and belong to a separate and detached corps. 1 Op. Atty Gen., 469.

In 1829, Attorney-General Berrien decided that West Point cadets were not commissioned officers within the meaning of the 64th Article of War, and that *brevetted* graduates of said institution were not such officers, until an office became vacant which they could fill. 2 Op. Atty. Gen., 251. Thus Mr. Berrien, not only sustained Mr. Wirt in the views he had expressed relative to the military status of the West Point cadets, but went a step farther,

and held that even after they had graduated at the Academy and had been attached to regiments as supernumerary officers, as provided by the 4th section of the act of April 29, 1812, they were not commissioned officers. The section of the act to which Mr. Berrien refers reads as follows:

"SEC. 4. That when a cadet shall receive a regular degree from the academical staff, after going through all the classes, he shall be considered as among the candidates for a commission in any corps, according to the duties he may be judged competent to perform: and in case there shall not at the time be a vacancy in such corps, he may be attached to it at the discretion of the President of the United States, by brevet of the lowest grade, as a supernumerary officer, with the usual pay and emoluments of such grade until a vacancy shall happen. *Provided*, That there shall not be more than one supernumerary officer to any one company at any one time." Dunlop, 475.

Such were the opinions of the Law Department of the Government, relative to the grade or rank of the West Point cadets, and such was recognized as the unquestioned law upon the subject up to the year 1855, at which time Caleb Cushing was Attorney-General. In this year the opinion of the Attorney-General was requested by Jefferson Davis, the then Secretary of War, "as to the relation of the rules and articles of war to the cadets at the Military Academy," and Mr. Cushing prepared and signed an opinion which has given rise to all the confusion which has existed upon this subject.

This opinion, which will be found in the 7th Opinions of Attorneys-General, 323, I shall proceed to examine; but as its *weight* in this discussion must depend upon the estimation in which its author is held as a lawyer by the legal profession, it may be well to determine, before we proceed farther, as to the legal standing of the man. Mr. Cushing, like many other men whose lives have been passed in public station, and who are more of politicians than

lawyers, had, undoubtedly, acquired a great reputation, but that reputation was derived rather from the positions he had held than from his achievements at the bar. He was a better scholar and diplomatist than he was a lawyer. A man who had mastered and could write and speak fluently six or eight different languages, and who was passionately devoted to the perusal of Spanish novels, it matters not how industrious he may have been, could have had little time to devote to the study of the science of the law. The law is a jealous mistress, and those who have become eminent in it, have made it the study of their lives, to the almost total exclusion of other subjects or pursuits. Mr. Cushing never gave the law this exclusive devotion; on the contrary, he aimed to acquire the character of a linguist, a dipomatist and a statesman. As a diplomatist and a statesman, he claimed to be more familiar with international law than any other branch of the science. As a lawyer, he was crochety and given to abstractions. I may safely say, though it may be deemed presumptuous in me to do it, that he was greatly overrated as a lawyer; and that there is no other man who possessed his legal reputation, for whose opinions the bar entertain so little respect. Such, in my judgment, was Mr. Cushing as a lawyer, and the opinion to which I am referring, I am convinced, when thoroughly sifted, will confirm that judgment.

In an examination of Attorney-General Cushing's opinion, it must be borne in mind, as he states himself at the outset, that the inquiry is, "as to the relation of the Rules and Articles of War to the cadets of the Military Academy." All that he says in response to this inquiry, is legitimate and a binding decision upon the War Department; all that is outside of the inquiry, is *obiter dictum*, and of no force or effect. Mr. Cushing commences his opinion by citing the laws then in force relating to the Military Academy, very much as Mr. Wirt had done, and then states his conclusions as follows:

"I have transcribed these provisions of the acts of Congress, which exhibit the existing organization of the Military Academy, for the general purpose of proving that the cadets are by law, members of the 'Corps of Engineers,' and as such an integral part of the land forces of the United States, as well as to show that as members of that corps, they are by express terms made subjects of the Rules and Articles of War.

"It thus becomes inevitable to conclude, as Mr. Attorney-General Wirt did, on a very critical examination of the same question, that the cadets are subject to trial by court-martial; and that point has been assumed and constantly acted on as law, ever since that day.

"It follows, in like manner, from the same premises, that the cadets are subject, in whatsoever is applicable to them, to such general regulations as, by successive acts of Congress, the Secretary of War may see fit to adopt, and with the approbation of the President may establish for the government of the army."

Having thus adopted Mr. Wirt's views, that the cadets are a part of the army of the United States, and subject to the Rules and Articles of War, like any other soldiers, Mr. Cushing proceeds to the inquiry as to the particular *legal status* of the cadets in relation to the Articles of War, and especially to courts-martial; and here again he adopts the conclusions of Mr. Wirt. He says:

"Upon this point there is an opinion of Mr. Attorney-Genener Wirt, which rules that cadets are not to be considered as commissioned officers; that they cannot serve on a court-martial in virtue of the 64th article; that they are subject to trial by a regimental or garrison court-martial under the 66th and 67th articles, as not being commissioned officers, and as belonging to a detatched corps. This conclusion is accepted by Attorney-General Berrien, as the starting point of his reasoning as to the legal state of graduated cadets during the time in which, according to law, they remain attached to some corps as supernumerary officers by the direction of the President.

"It seems to me, on revision of the statutes and regulations, that in this precise matter *their conclusions are correct*, and that undergraduate cadets are, in the eye of the law, not commissioned officers, but *warrant officers*."

Here, for the first time, is a *warrant* officer mentioned in connection with this subject, and this is one of the abstractions which is characteristic of the opinions of Mr. Cushing. After coinciding with Mr. Wirt and Mr. Berrien in holding that the cadets were not commissioned officers; that they were a part of the army, and subject to the Rules and Articles of War, like other soldiers; and that they were liable to trial by garrison or regimental courts-martial, *as only enlisted men are*—after stripping them of all rights and privileges except those which pertain to the private soldier—Mr. Cushing evidently did not wish to lower the dignity of the cadets by giving them the designation of "enlisted men," so he resorted to that of warrant officer. What then is a warrant officer, if such a position is known to military law, and are the cadets entitled to that designation? In fact, neither in the statutes organizing and regulating the army, nor in the Rules and Articles of War, is there any such officer as "warrant officer," known or provided for; but such officers do pertain to the Navy, and are recognized by law. They are boatswains, gunners, carpenters, and sail-makers, and the act of July 2, 1864, (Rev. Stat., sec. 1406,) expressly ordered that they should be "entered upon the Naval Register as warrant officers in the naval service of the United States." They are appointed by the President, and "seamen distinguishing themselves in battle, or by extraordinary heroism in the line of their profession, may be promoted to forward warrant officers upon the recommendation of their commanding officer, approved by the flag-officer and Secretary of the Navy." But the statute further provides that "*the rating of an enlisted man as a mate, or his appointment as a warrant officer, shall not discharge him from his enlistment.*"

Rev. Stat., Secs. 1407, 1409. We learn from the statute, then, that a warrant officer in the navy, is a common sailor, or *enlisted* man, promoted for meritorious conduct, and that such promotion does not discharge him from enlistment; so that if I were to admit that such an office as warrant officer existed in the army, and that it was identical with that position in the navy, it would only follow that if a West Point cadet is, by military law, a warrant officer, *he is none the less an enlisted man.* Mr. Cushing, in his abstraction, borrowed the idea of warrant officer from the Navy, for he says:

"The legal condition of undergraduate cadets thus appears to be in some respects analogous to that of midshipmen in the Navy. *Their* warrant, being from the President, is indeed a species of commission, granted by the President as to persons of the class of the inferior officers of the Constitution."

If the word "*their*" in the above quotation, refers to the appointee to West Point, as I suppose it does, and if Mr. Cushing intends to say that such appointees receive warrants from the President, I undertake to say that he is mistaken as to the fact. The President issues no warrant to an individual appointed to the military academy, and Mr. Cushing's knowledge of the practice of the War Department is as defective as his logic is lame. If the word *their* applies to the midshipmen of the Navy, then the answer is, that a midshipman is a commissioned officer, and the analogy fails, and failing, the argument it supports must fail with it. But, as I have said, in the army there is no such position known to the law as warrant officer, or recognized in the statutes governing the army, and no such officer can exist in the army unless created by law.

While it is true, as I stated, that neither in the statute organizing and regulating the army, nor in the Rules and Articles of War, is there any such officer as "warrant officer" known or provided for, it is equally true that *sergeants*

and *corporals* are provided with a *warrant*, issued by the commandant of the post or the colonel of the regiment, to which such subordinate officer belongs, and the object of which is to show the right of such subordinate to exercise his functions. These positions are filled and held at the will of the colonel of the regiment or the commandant of the post, are always conferred upon *enlisted men*, and are revokable at the pleasure of the officer conferring them. They are analogous to the warrant officer of the Navy, which the law does provide for; and like that officer, are none the less enlisted men. In other words, if we recognize sergeants and corporals as "warrant officers" of the Army, this position does not remove them from the responsibilities of private soldiers; and, therefore, Mr. Cushing's argument fails. And if all sergeants and corporals are to be regarded as warrant officers, as Mr. Cushing assumes, and are, therefore, not enlisted men or soldiers, but occupy a grade between the commissioned officer and the common soldier; and if, by reason of being warrant officers, they are not entitled to longevity pay, as Solicitor-General Phillips also assumes, it is difficult to see to whom in the Regular Army the law applies. It is a notorious fact that scarcely any promotions are made from the ranks of the army except from the grade of sergeants and corporals. I doubt whether a *private* has been ever directly promoted to a commission in the Regular Army; and if sergeants and corporals, by reason of their holding these positions, and being dubbed warrant officers, are not to be regarded as enlisted men, and entitled to longevity pay, then so much of the 7th section of the act of June 18, 1878, as applies to enlisted men, is a nullity. It follows from this, that even if we adopt Mr. Cushing's idea, that the cadets are warrant officers, their legal *status* in the army is not changed, and that they still are nothing more than enlisted men. And sergeants and corporals of the cadet corps, receive precisely such certificates or

warrants of authority, showing that they are regarded in the army as occupying the same position as similar non-commissioned officers in the other corps, and fill no higher grade.

It is true, however, that the regulations of the Military Academy, adopted by the President, in pursuance of the power conferred upon him by statute, do provide that each cadet shall receive a *warrant*. But *when*, and what is its purpose? Regulation No. 20 provides that he shall "not receive his warrant until after the January examination next ensuing his admission, and *then only* upon the certificate of the Academic Board that he has passed that examination in a satisfactory manner, and that his moral and military conduct previously thereto has, in like manner, been satisfactory." In other words, a cadet enters West Point, say on the 1st of July, and from that time till the January examination, he is on a kind of probation; and if at that examination, he passes successfully, and his conduct otherwise has been good, it may be said he is admitted into full membership, and receives his warrant. Thus he is on duty six months, before, according to Mr. Cushing's theory, he becomes a "warrant officer," although he signed "articles" and took the oath of allegiance, when he first entered; and it may be well to inquire what is his position or grade in the army between July and January? If he is *not* a commissioned officer, nor an enlisted man, and cannot be a warrant officer till he receives his warrant, he is a nondescript, and yet for six months, he has been *in* the army, governed by, and subject to the Articles of War, and deprived of his civil rights! This mere statement, it seems to me, of Mr. Cushing's argument is sufficient to demonstrate its fallacy.

But what is this warrant, and what is its purpose? I have the printed form of one before me, furnished by an officer of the army, and it reads as follows:

"*To all whom it may concern:*

"Know ye that the President has been pleased to appoint ——— a cadet of the United States Military Academy, to rank as such from the —— day of ———, 18—.

"Given under my hand and seal, at the War Department, this —— day of———, in the year of our Lord 18—, and of the Independence of the United States the———.

"—— ———,

"*Secretary of War.*"

This is the warrant which Mr. Cushing cites as "a species of commission," and the court will see at a single glance, that it confers no power nor authority, and is only a certificate which shows that the holder is attached to the institution at West Point, and which might be useful to him when on leave or otherwise. And this is its only purpose. So far, I have adopted the view of the Solicitor-General, in an opinion hereafter to be noticed, in assuming that Mr. Cushing applied the term "warrant officer" to all the cadets of the Military Academy, while they were performing their double duties of students and soldiers. But, in point of fact, he was only speaking of graduated cadets, who had been "attached" to some company as supernumerary officers; and he decides that even after they have thus graduated and been attached as a supernumerary officer—after they had become "warrant officers" —*they could not legally sit upon courts-martial.*. And this decision strengthens the argument, that even after graduation, and while exercising the authority, and performing the duties, of a supernumerary officer, they are nothing more, in legal contemplation, than enlisted men. It follows, then, that if Mr. Cushing's term "warrant officer" applies only to cadets who have graduated and are awaiting commissions, it does not affect those cadets who have not graduated, and whose *legal status* we are seeking to determine.

It is evident to me from this opinion, that Mr. Cushing

had some personal motive in writing it. He probably had some relative or friend at the Academy, and doubtless considered it degrading to rank him as a soldier or enlisted man. It must be remembered also that when this opinion was prepared, Jefferson Davis was Secretary of War; that the Southern States at that period were largely represented at the Academy by the sons of the wealthy landholders and cultivated men, who constituted the aristocracy of that section; that a different spirit was dominant in the South in 1855, to that which prevailed when WILLIAM WIRT and JOHN MCPHERSON BERRIEN filled the position of Attorney-General; and the probability is, that Mr. Davis, as the representative of this section, was not pleased that the scions of the first families should not be rated any higher in the army than soldiers or enlisted men. Mr. Cushing, I entertain little doubt, fully understood the feeling that existed upon this subject, and was willing to pander to it. Being confronted by the decisions of Attorneys-General Wirt and Berrien, that cadets were not commissioned officers, that they were governed by the Articles of War, and triable by garrison or regimental courts-martial, which placed cadets on the same plane with enlisted men—positions that he was unable to refute—he resorted to the device, as many a lawyer had done before, of confession and avoidance. Adopting the vagary that cadets were warrant officers, and occupied a position midway between commissioned officers and enlisted men, he proceeds to make an argument in support of that theory, all of which is *obiter*, and of no legal force.

Mr. Cushing well knew, for he had quoted the statute in the first part of his opinion, that from the very inception of the Academy, when it was a branch of the "Corps of Engineers," the law *treated cadets as enlisted men or soldiers*, by providing that "they shall be arranged into companies of *non-commissioned officers and privates*, according

to the direction of the commandant of engineers, and be officered from said corps, (that is, commanded by a commissioned officer), for the purpose of military instruction." Act of April 29, 1812. And to overcome this plain requirement of the law, and save the cadet from what he deems the degrading position of a soldier, he argues as follows:

"I have said that, by statute and regulation, cadets are 'warrant officers,' and that they are not commissioned officers. I add, that although not commissioned officers, still neither are they of the class of officers intended by the technical term, 'non-commissioned,' which, most indubitably, in the 67th article, means nothing but 'sergeants and corporals,' as clearly defined in sections 117 and 122 of the General Regulations. (Ed. of 1847.) Now, cadets in the Military Academy are not the enlisted soldiers of a technical company, taken from the ranks of that company by appointment of the proper officer, to do duty therein as sergeant or corporal on the authority of a certificate of the colonel of the regiment. To be sure, in the course of their military education at West Point, they are by statute organized and disciplined as a corps, with its officers, non-commissioned officers and privates, *but that is only among themselves;* it is a mere *simulacrum belli;* it is not an organization defining their relation to the army at large, or to the Articles of War. But the 'non-commissioned officer' of the statute and of regulation is a person having a positive relation to the whole army, wherever or however he may be on duty. *He is never more nor less than an enlisted soldier*, certified for the time being as a sergeant or corporal. This is a condition, which in no possible view, can be considered the *status* of a cadet of the Military Academy."

And then, after admitting that by statute, the cadets are "subject at all times to do duty in such places and on such service as the President of the United States shall direct," which admission shows that the cadets have "a positive relation to the whole army," and entirely overthrows his previous argument, he asks:

"Can the President assign a cadet to duty as a corporal in any company of infantry or cavalry of the army?"

This question Mr Cushing answers himself as follows:

"Such a power no more follows from the provision quoted, than a power to assign a captain or a colonel of engineers to do duty as a corporal in some regiment of the line. The service to which any member of the corps of engineers is ordered, must be such as corresponds to his grade, and as the rules of the service justify. That doctrine applies to cadets as plainly as to any other member of the Corps of Engineers."

Let us review this reasoning briefly. In the first place, as I have already shown, cadets are *not* warrant officers by statute, as Mr. Cushing asserts, and the regulation warrant is a mere certificate of admission to the Academy, conferring neither rank nor authority. In the next place, the law, in providing that the cadets shall be organized into companies and officered as other companies in the service are officered, makes no such distinction as that Mr. Cushing seeks to establish, viz.: that it is "only among themselves." When the statutes require that the cadets "shall be arranged into companies of non-commissioned officers and privates," it impresses upon them the military character of non-commissioned officers and privates as defined by law; and there is not a single word or phrase in any statute which changes the duties of a cadet-sergeant, corporal or private, from those imposed upon other enlisted men, or which alters their liability to punishment for any violation of their duties as such non-commissioned officers and privates. Nor is there any thing in the interrogatory which he propounds, as to the power of the President to assign a cadet to do duty as a corporal in any company of infantry or cavalry in the army. No one pretends that the President possesses any such power. Sergeants and corporals are officers of the companies and regiment to which they belong. They possess no *tenure* of office. They are

appointed by the colonel of the regiment, or the commandant of the garrison; they hold their positions subject to his will; and he may reduce them to the ranks whenever, in his judgment, the public service requires it. When a sergeant leaves his regiment, he is nothing more than an enlisted soldier, and when transferred to a different regiment, as he may be, he takes his place in the ranks as a common soldier, unless he is appointed a non-commissioned officer in the regiment to which he has been assigned. Since 1812, when all branches of the service were admitted to West Point, the presumption is, that none of the companies into which the cadets are organized, belong technically to the artillery, cavalry or infantry, and that they are trained alternately in each branch of the service, so as to familiarize them with all, and render them competent. in case they become commissioned officers, to command in either branch of the service. And the President, in ordering them to duty in other places, may attach them to the artillery, cavalry, or infantry as he deems best for the public interest. Mr. Cushing's whole argument upon this point, is the refinement of sophistry, resorted to to defeat a conclusion to which the statutes inevitably lead; and his conclusion from this argument, that cadets cannot be treated as mere privates or technical non-commissioned officers"—"that they must be treated as *quasi* commissioned officers"—is without foundation in law or reason, and a figment of Mr. Cushing's brain, which has never been adopted by the War Department.

I might stop here in this review of Mr. Cushing's opinion, in the conviction that I have demonstrated that it sets the statutes at defiance, and is full of the idiosyncracies for which its author was famous. But he takes another position in support of his theory which is equally unsupported by the statutes, which I deem it proper to notice. Thus, he says:

"They (the cadets) are not enlisted soldiers, but are 'engaged' by a special act of 'engagement,' after having been carefully selected with reference to their unchangeable destination, which is, at the conclusion of a thoroughly military education, if they continue in the service, to become commissioned officers of the army. They cannot be compelled to serve in the field as 'privates,' or as 'non-commissioned officers.' Nay, they cannot be made such, even with their own consent, without first ceasing to be cadets. Their condition from the beginning is that of *future officers*, never that of future sergeants, corporals or privates. To use a familiar term of the common law, in regard to other matters they are simply *inchoate* officers, and as such entitled in all possible circumstances to certain of the legal rights appertaining to the condition of 'officers' of the army as distinguished from 'non commissioned officers and privates.'"

Whilst it may be conceded that the primary object of the Military Academy is to educate men for the position of commissioned officers of the army, and that those cadets entering the Academy, do so with the expectation that they will, after graduation, receive such appointments, it is to be observered *that no contract was made with the cadets by the government that they should be thus commissioned.* The act of 1802, under which the Academy was organized, contained no provision upon the subject, and held out no such promise, while the act of 1812, only provided that the graduates "*shall be considered among the candidates for a commission in any corps. according to the duties he may be judged competent to perform.*" Dunlop, 475. Under this act, it was decided by the War Department in 1845, (G. O. No. 11, 1845, Scott's Dig. of Military Laws, 126), that the President was not required either to commission such a graduate when there is a vacancy, or to attach him as a supernumerary officer by brevet of the lowest grade, when there is no vacancy; but he may do so at his discretion. This law and this decision were in force when Mr. Cushing wrote his opinion in 1855, and it continued to be the law

until within a very recent period ; and I am informed by army officers that instances have occurred in our history in which the President, either from a want of moral character on the part of the cadet, or for other good and sufficient reasons, in the exercise of the discretion conferred upon him by the statute, has refused to commission graduated cadets of the Military Academy. The cadets, then, were not specially engaged with reference to their "unchangeable destination" to "become officers," nor had they any positive promise that they should become such, while, on the other hand the law expresssly provided that upon their admission to the Academy, they should be formed into "companies of non-commissioned officers and privates," *i. e.* sergeants and corporals.

But this statement is no more reckless and unfounded than the assertion that "they cannot be compelled to serve in the field as privates, or as non-commissioned officers," and that "they cannot be made such, even with their own consent, without first ceasing to be cadets."

As I have heretofore shown by quoting from the statute, and as Mr. Cushing concedes, the cadets are not only subject to the Articles of War, and the orders of the President of the United States, but the law expressly provides, and has so provided from the foundation of the institution, that the cadets shall be subject at all times to do duty in such places, and in such service as the President shall direct, a grant of power as broad as that conferred upon the commander-in-chief with reference to any other of the military forces of the United States.

I have only to add, in conclusion of this review of Mr. Cushing's opinion, that it is reckless in statement, misrepresents the statutes, and is confused and illogical in argument, while the opinion of Mr. Wirt is as "limpid as the mountain stream," and is, what the law is pronounced to be, "the perfection of reason." On the question before the court, then, namely, whether the stat-

utes regard and treat the cadets of the Military Academy as soldiers or enlisted men, WILLIAM WIRT and JOHN MCPHERSON BERRIEN are arrayed upon the side of the affirmative, while CALEB CUSHING, who was a Talleyrand in diplomacy and politics, and literally "all things to all men," stands upon the opposite side; and if I say that when compelled to choose between them, I must give *weight* to the opinions of the former in preference to those of the latter, I but announce a decision in which all well-read lawyers will concur.

And this brings me to the latest decision of the Department of Justice upon this subject, being the opinion of Solicitor-General Phillips, dated the 7th of August, 1880, in which he places a construction upon the 7th and 9th sections of the act of June, 18, 1878, upon the first of which sections the claimant relies, and which has created the necessity for this suit. The questions propounded by the Secretary of War to the Attorney-General, in relation to section seven are:

"1. Whether cadets at West Point are to be regarded as *enlisted men*; and

"2. Whether service performed by enlisted men previously to the War of the Rebellion is to be taken into account?"

And the Solicitor responds as follows:

"1. Upon consideration, it seems to me that cadets are *not* enlisted men, within the meaning of the section above quoted.

"2. The second question above stated presents no special difficulty. The phrase, 'during the War of the Rebellion,' is introduced as a limitation upon the clause providing for *officers*, but is omitted from that which refers to enlisted men."

The War Department deeming it proper to be guided by the opinions of the law officer of the government, instructed the pay bureau to follow the decision of the Solicitor-General; and thereupon the claim of the claimant

was rejected, and the only remedy open to him was to seek redress in the Court of Claims.

By his answer to the second question, I understand the Solicitor-General to decide that enlisted men in the armies of the United States, whether they were regulars or volunteers, and whether they served during the war of the rebellion or not, are to be credited with the full time they may have served as such enlisted men, in computing their service for longevity pay and retirement. In this opinion, I concur, and it follows, therefore, that the only question to be determined is, whether the cadets of the Military Academy are included in the term "enlisted men" as used in this section of the statute?

That I may do no injustice to the Solicitor-General, and that the court may be fully advised upon the subject, I deem it proper to give in full the reasons upon which he bases his conclusion, that the cadets at West Point are not enlisted men within the meaning of the section in question, which are as follows:

"A perusal of other sections of the act of June 18th, last, shows that Congress was at that time making special provision for the benefit of privates and non-commissioned officers who had been or might be promoted as officers; section 2 enacts that every official Army Register *hereafter* issued, shall state the previous *service as a private or non-commissioned officer* of all officers promoted from the ranks or having served in the Volunteer Army, either as enlisted men or as officers; section 3 enacts that all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy, or failing those, by promotion of meritorious non-commissioned officers of the army; and that only after the exhaustion of the above classes, shall appointments be made from civil life; and section 4 makes detailed provision for such promotions of non-commissioned officers.

"It seems to me that section 7 is plainly an exhibition of the same policy. The officers spoken of in section 2 are such as

have been *promoted from the ranks of the regular army*, or as have served *as enlisted men*, or *as officers in the volunteer army*; those spoken of in section 7 are such as have served *as officers in the volunteer forces*, or *as enlisted men in the army, regular or volunteer*. In the former section, the two classes mentioned are arranged with reference to the branch of the service (regular or volunteer) from which they come; the two classes in the latter section, are arranged with reference to their previous rank, viz., as officers, or enlisted men.

"The persons, however, who are to be registered in a particular way, under section 2, are the same that are to receive a particular credit under section 7. Indeed section 2 is preliminary to section 7, and provides the evidence needed for its ready administration. Therefore, as officers who were primarily cadets, cannot be described as "promoted from the ranks" under section 2, it follows that such previous condition is not included under the phrase "enlisted men" in section 7.

"I add that the meaning of the phrase 'enlisted men,' derived as above from considering different provisions in the act before us, is also that ordinarily in use. Whatever may by said as to the virtual effect of the process by which civilians become cadets, its technical, specific name is not *enlistment*, but *admission*; and in the same way, after admission they are not *men*, but *cadets* of the army.

"I have in this connection read and considered the opinions referred to in the papers transmitted, viz., those to be found in 1 Op., 276, 346, and 469; 2 Op., 251, and 7 Op., 323. It is true that in one instance (1 Op. 290) Mr. Wirt, arguendo, calls cadets 'enlisted soldiers.' The conclusion to which he came, however, did not turn upon that expression, and the subsequent well-considered discussion of the topic by Mr. Cushing, (7 Op., 323), in which the view now adopted is clearly maintained, may well be characterized as making substantially an end of controversy thereupon."

This is all that the Solicitor-General has to say upon the subject; and it appears that his main reason for construing the section as he does, is that by this act of June 18, 1878, "Congress was making special provision for the benefit of

privates and non-commissioned officers, who had been or might be promoted as officers." In other words, he regards this portion of the statute as a special act for the benefit of specific persons; but it is so, in fact? We turn to the title of the act, and find that it is a general law, one enacted annually, making appropriations for the support of the army and for other purposes, and affecting every man in the army, whether officer or soldier, during the fiscal year of 1879. It not only provides for the pay of every man in the army, whatever may be his rank or grade, but properly and naturally provides for the pay of those who may enter it during the year. We all know that bills of this character are prepared at the department to which they pertain, and that they are thus prepared by experienced officers who understand the needs of the service, and the policy to be pursued. There can be no doubt, I think, but that this act was thus prepared. While many of the sections are incongruous with each other, and each must be considered with reference to its subject-matter, they all relate to the army, and are, therefore, properly embodied in the same statute. It is a general law, then, designed to operate upon the army as a whole, and, I think, the Solicitor-General is mistaken in assuming that its only purpose was to make "special provision" for one class of persons, and that in its application it is to be confined to that class.

The act is in some respects retroactive and remedial in its nature. It is retroactive in this, that it confers a privilege not heretofore enjoyed by volunteer officers or soldiers, in the late war, viz.: that "if the officer be promoted from the ranks, or shall have served in the volunteer army, either as enlisted man or officer, his service as a private and non-commissioned officer shall be given, and in addition thereto the record of his volunteer service." Sec. 2. It is remedial in this, that it allows him, in computing his longevity pay, to include in his period of service

the time he had previously served as such officer or enlisted man, and thus increases his pay. And being remedial in its character, the law is to be liberally construed, so as to effectuate the intention of the legislative branch of the government. In addition to this, in its construction, the language employed in the act, is to have that signification which is in common use in the army, and which is recognized by military law. There can be no doubt about these rules of construction. They have long been settled, and are uniformly recognized. Thus, the word "soldier," "volunteer," "regular," "enlisted man" and "private," all signify in military parlance one who is under *contract* to serve the government in a military capacity. Indeed, the statute provides, and has so provided since the year 1806, that "the word officer" as used in the Articles of War, shall be understood to designate commissioned officers; and the word soldier shall be understood to include non-commissioned officers, musicians, artificers and privates, and other enlisted men;" (Rev. Stats., sec. 1342,) and where these words are used, it must be assumed that Congress intended to, and did, use them in accordance with the meaning given to them by law. They must thus be interpreted in the construction of this act. The definition given them is as binding upon this court, as upon any other persons, and using them in the legal sense, there will be no difficulty, it appears to me, in ascertaining the intention of the law-making power in the enactment of the act of June 18, 1878.

Adopting these rules of interpretation, let us examine the various sections of this act, and determine how far one is dependent on the other, and how many embrace separate and distinct objects. The first section is confined entirely to appropriations for the support of the army during the fiscal year 1879, and would be a perfect law if it stood entirely alone. The second section provides, 1, "that in every Official Army Register hereafter issued, the lineal

rank of all officers of the line of the army shall be given separately for the different arms of the service ;" and, 2, That "if the officer be promoted from the ranks, or shall have served in the volunteer army, either as an enlisted man or officer, his service as a private and non-commissioned officer shall be given, and in addition thereto, the record of his service as a volunteer." This is also a separate provision, standing by itself, and its object was twofold: 1. To change the manner of publication of the Army Register, by showing the lineal rank of the line officers separately for the different arms of the service; and 2. To give officers promoted from the ranks, or who had served in the volunteer army, full credit for their military history. It was a necessary provision, in order to place upon the official record of the War Department, the previous service of the persons included in its terms, for without it, their military record would have commenced with the date of their first commission in the regular army, and their previous achievements as soldiers or volunteer officers entirely ignored. This portion of the section may be a "special provision" for the benefit of the newly created officers of the regular army, as the Solicitor-General claims ; but if so, it is only because the law had already provided for preserving in the Register the records of the regular officers, and this "special provision" was required to put the new men upon the same footing, and as to all such, it is a general and not a "special provision."

The third and fourth sections of the act relate to the appointment of officers, and reference is made in one to the other. These are, therefore, to be considered together, as pertaining to the same subject-matter. The third section provides "that hereafter all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy, so long as any such remain in service unassigned ; and any vacancies thereafter remaining shall be filled by promotion of meritorious

non-commissioned officers of the army, recommended under the provisions of the next section of this act: Provided, That all vacancies remaining, after exhausting the two classes named, may be filled by appointment of persons in civil life."

This section affects three classes of person: 1. The graduates of the Military Academy, and gives them the *legal right* to appointments as second lieutenants in the regular army. It may be remarked that the section does not designate them as *cadets*, showing by implication, at least, that a cadet has no established grade or rank in the army. This is believed also to be the first act enacted that divested the President of the discretionary power conferred upon him by the act of April 29, 1812, in relation to conferring commissions upon the graduates of the Academy. As I have before stated, from 1812 up to the passage of this act, they were "only considered candidates for a commission," and if the President, for any reason, refused to make the appointment, the cadet was without remedy. This section, then, gives the graduate of West Point a *right* he never posseesed before—the right to be appointed a second lieutenant in the army, and is general in its character. 2. The second class of persons whom the section benefits are meritorious non-commissioned officers, properly recommended, who are entitled to the vacancies in the army, after the West Point graduates are provided for, a *right* they never possessed until the enactment of this statute; and the third class are persons in civil life. Thus the second and third sections of the act define the policy to be pursued in officering the regular army in the future, and they affect generally the whole military establishment of the United States. The fourth section provides for the examination and promotion of non-commissioned officers of the army. The fifth section relates to laundresses in the army, and the sixth to military headquarters. Then comes the seventh, upon the construction

of which the case at bar turns, and which I shall examine further on. The eighth regulates the allowance of fuel and forage to which officers are entitled. The ninth to quarters in kind. The tenth, eleventh, and twelfth provide for the creation of a joint Congressional committee on the re-organization of the army; and the thirteenth relates to the same subject-matter, by prohibiting promotions in the line of the army above the rank of captain. The fourteenth provides for the appointment of a joint committee of Congress to consider the expediency of transferring the Indian Bureau to the War Department; and the fifteenth prohibts the use of the army as a *posse comitatus*, under certain circumstances, while the sixteenth and final section repeals all acts inconsistent with the provisions of this act. From this statement the court will perceive that the act of June 18, 1878, covers a good many subjects, incongruous in themselves, yet, as pertaining to the army, properly enacted in one statute; that many of the subjects thus legislated upon are independent of others; and that when thus standing by themselves they must be construed as separate enactments.

With this statement of the contents of the act, and of the subjects embraced in its different sections, let us return to the consideration of the second and seventh sections, and to the construction placed upon the latter by the Solicitor-General.

The Solicitor-General assumes that "section two is preliminary to section seven, and provides the evidence needed for its ready administration," and if this is clearly apparent from the two sections, then his view must be conceded to be correct. There is no reference in one section to the other, as there certainly would have been, if his theory is correct, and hence his conclusion is only a matter of inference. But each section has a different object, each stands by itself, with sections intervening having no connection with the subject-matter, and each standing alone is perfect

in itself. As I have already stated, section two opens the Army Register to the entry of an officer's military record prior to his promotion to the regular army, something that had never been done before, and its purpose was to enable that officer to perpetuate his services in the army during the war, as a private soldier or volunteer officer. But section seven is broader in its scope, and has a double purpose. The first was to put the new officers who had been previously promoted to the Regular Army from the ranks of that army and from the volunteer forces, upon the same footing as other officers as regards longevity pay and retirement, and they were the only persons who needed the requirement; and the second purpose of this section was to change the law regulating the computation of longevity pay, or rather changing the time when the computation should commence. The first section of the act of March 2, 1867, provided that "in computing the length of service of any officer of the army, in order to determine what allowance and payment of additional longevity rations he is entitled to, * * * there shall be taken into the account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the regular army, or since the 19th day of April, 1861, in the volunteer service, either under appointment or commission from the governor of a State or from the President of the United States." This statute, it will be seen, was entirely in the interest of those who had been commissioned officers either in the regular or volunteer service. In terms, it excluded those who had served in the ranks previous to their promotion to commissions in the regular army, from the benefit of that service in computing their longevity pay, and it was to broaden the rule and extend it to enlisted men, promoted from the ranks, that the seventh section of the act of June 1878, was passed.

From this, I think it will be clear, that section seven is not limited by section two, or in any way dependent upon it. And this will be still more apparent, if we try the two sections by another test. Suppose that section two was entirely stricken from the act, will it be pretended for a moment, that the parties named in section seven would not be entitled to longevity pay in accordance with the rule established by that section; or that, if section seven had never been inserted in the act, that the officers named in section two would have been deprived of the right of having entered in the Army Register their military service prior to their appointment to the regular army? Such a proposition cannot be entertained seriously, it seems to me, by any legal mind. Nor is there any more force in the suggestion of the Solicitor-General, that section two was designed to provide "the evidence needed" for the "ready administration" of section seven. Every officer named in section seven, had served in the army in some capacity prior to his promotion, and the record of that service in each case was on file in the War Department, upon the muster rolls of the staffs, regiments or companies to which he had belonged. Tried by these tests, and with all deference to the legal learning and official position of the Solicitor-General, I must insist that section seven of the act of June 18, 1878, is a substantive provision, standing by itself as to the subject-matter involved, not limited by any previous section, and that it must be liberally construed, so as to carry out the just and reasonable intention of Congress.

We are thus brought to the direct consideration of section seven, and to the question, whether the phrase "enlisted men in the armies of the United States, regular or volunteer," includes the students or cadets of the Military Academy at West Point?

This section covers two classes of officers: 1. Those "who have served as officers in the volunteer forces during the

war of the rebellion ;" and 2. Those who " have served as enlisted men in the armies of the United States, regular or volunteer ;" and each are to " be credited with the full time they have served as such officers and enlisted men in computing their service for longevity pay and retirement." The first thing to be observed in reference to this section is, that it regards the distinction which exists between officers and soldiers, as defined and fixed by statute, or, to use the language of the Solicitor-General, " the two classes," in section seven, "are arranged with reference to their previous rank, viz., as officers or as enlisted men ;" and this distinction must be kept in view in giving a construction to the statute. The Solicitor-General decides, and in that there is no divergence of opinion between us, that the " enlisted men " need not " have served " " during the war of the rebellion," in order to be entitled to the benefit of this section ; it is sufficient if they at any time served as enlisted men in the armies of the United States, regular or volunteer ; and this decision, in my view of the question, goes far to solve the proposition at issue in this case. The section as thus construed, *covers every man who had served as an officer in the volunteer forces during the war, and every man who had previously served as enlisted men in the army, whether in the regular or volunteer force, without any limitation as to time*, and gives to each and all of them the right to include that previous service in their computation for longevity pay and retirement. It is thus evident that the scope of the section is much broader than the Solicitor-General imagines, and it is clear to me that he did not give the subject that full examination which its importance demanded. This section, as I view it, and as I believe an impartial court will construe it, goes behind the period of the war, and confers upon every officer of the army below the rank of brigadier-general, whether appointed from the volunteer force or from the regular army—whether he was an officer in the one, or an enlisted

man in the other—the right to count his full period of service to the government in a military capacity and allows him longevity pay for that service.

But we may adopt the assumption of the Solicitor-General, that section two is preliminary to section seven, and provides the evidence needed for its ready administration. without impairing the argument I am making, or destroying the construction to be placed upon section seven for which I am contending. And I shall now proceed to make this apparent. As I have already stated section two provides for the insertion in future Army Registers of certain additional records of the service of army officers, viz., their military record prior to their promotion to the Regular Army; section seven changes existing law, by prescribing that officers shall be allowed to include certain additional service in computing their longevity allowance; *and this additional service is identical with that required by section two to be inserted in the Register.* Now, previous to this act, the Army Register contained only a record of the service on which the officer was entitled to longevity allowance, and Congress by this act, *increased the record and the allowance by exactly the same amount.* This coincidence cannot be accidental, but indicates beyond a doubt, that Congress had some object in enlarging the Register, other than solicitude for the personal glory of the officers. In this view, "section two 'may be' preliminary to section seven," but the former does not limit the latter, in my judgment, as contended for by the Solicitor-General.

And this is the view taken of the act by the War Department, as is evidenced by the fact, that the next Register issued by the Department after the passage of the act, contained the *cadet service* of each graduate of the Military Academy, a record which did not appear before. The laws which provide for the publication of the Army Register, are set forth on the reverse of the title page, and in none of them is there any color of authority for

including cadet service, unless it be the act of June 18, 1878. This action of the officials of the War Department certainly constitutes an admission that cadet service is comprehended in the provisions of section two, and nullifies the argument of the Solicitor-General, that the cadets are not "enlisted men," nor "promoted from the ranks" within the meaning of that section. By the construction for which I am contending, and which the War Department by its action has conceded to be the correct one, the equilibrium which previously existed between the recorded service of an officer, as shown by the Army Register, and his longevity allowance remains undisturbed. Otherwise every officer of the army is entitled to include in computing his longevity allowance, *every* day of service that follows his name in the Register, with the exception of graduates of the Military Academy, who must deduct four years or more from their time as shown in the Register—an incongruity that Congress certainly never intended to create.

And in the case of medical cadets, the War Department has placed a similar construction upon the statute. As I have shown, medical cadets were authorized to be employed for one year, and given the pay and rank of West Point cadets. They were held by the War Department to be enlisted men, and that those officers now in the army, who had served as medical cadets during the war, were entitled under the 7th section of this act, to include that service in computing their longevity pay. In fact, it has been the policy of the War Department to give a liberal construction to statutes of this character. The case of military storekeepers illustrates this assertion. Prior to the act of July 28, 1866, these officers, though commissioned, held no specific rank. That act conferred upon them the rank of captains of cavalry, and it was held by the Department, in the case of a storekeeper appointed in 1861, that though his rank as captain dated only from the act of 1866, he was entitled to the increased pay on account of

length of service, provided for commissioned officers of the army by section 1262 of the Revised Statutes, according to the date of his original appointment. From 1861 to 1866, this officer was only an enlisted man, without rank; yet, after rank was conferred upon him, in computing his longevity pay, he was held entitled to include his previous service.

It may be well here to inquire what is longevity pay, its purpose and object? Longevity pay is a *device* to increase the pay of officers, over and above their regular salaries, and is given as a reward for past services, and as an inducement to officers to remain in the military service; and in this respect, the statute in question is retroactive. The 24th section of the act of July 15, 1870 (Rev. Stats., 1262, 1263), provides that "there shall be allowed and paid to each and every commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per cent. of their current yearly pay, for each and every term of five years of service;" but the "total amount of such increase for length of service shall in no case exceed forty per cent. on the yearly grade as established by this act." Longevity pay is also given to enlisted men, in pursuance of the acts of 1854 and 1872 (Rev. Stats., secs. 1281, 1282), by which their pay is increased with every re-enlistment, and we thus see that it pertains to all ranks of the army. It is thus a regular system, and it was the object and purpose of the 7th section of the act of June 18, 1878, to give it a uniformity that would operate justly upon officers and men of all grades in the army. Thus, under what I deem to be the legal construction of this section, every officer below the rank of brigadier-general is entitled to compute his service for longevity pay from the commencement of his military career. The volunteer includes in his period of service, the time he served as a volunteer; the graduate of the Military Academy includes in his term of ser-

vice, the period he spent at that institution ; and the soldier promoted from the ranks, counts in his term of service, the years of his period of enlistment ; while the appointee from civil life, having no military record behind him, is compelled to serve five years, before he can commence computing his service for longevity pay. If this is not the true construction of the section—if the graduates of the Military Academy are not included in the term 'enlisted men," as used in section seven—then they are most unjustly discriminated against ; and they are the only officers in the army, below the rank of brigadier-general, who, in computing their longevity pay and right to retirement, are excluded from including their whole period of military service.

Why should this discrimination exist? Why should they be excluded from a provision extended to all other officers? It is no answer to say, as has been said, that they are mere students, being educated at Government expense, and are of no benefit or service to the United States. While it may be conceded that they are students, they are also something more ; they are soldiers, not merely by contract, but by a solemn oath, by which they are bound to perform military service whenever and wherever ordered to do so by the President of the United States ; and if the statutes establish anything, it is that their *legal status* is that of enlisted men. Does any one doubt that if the rebel armies, in their invasion of the Northern States, had surrounded West Point, and demanded its surrender, the cadets would have been required to perform the service of soldiers in its defense, even to digging in the trenches, to the great horror of Caleb Cushing! The fallacy of this argument is apparent when applied to other officers of the army who are not graduates of West Point. The Government pays for the education of all its officers in the military sarvice. The individual appointed to the army from civil life, in nine cases out of

ten, is totally unacquainted with the duties of military life; he knows nothing of the tactics and evolutions of the profession; and while he is learning these, and fitting himself to discharge the duties his commission devolves upon him, he is drawing his full salary. So a soldier promoted from the ranks, has many things to learn in order to qualify himself for his new position, and he, while learning these, not only draws his monthly salary as a commissioned officer, but is also drawing longevity pay, if his period of service in the ranks extended five years. And the service of these men, thus constituted officers, is no more laborious, or beneficial to the Government, than that rendered by the cadets of West Point. In the same way the Government educates its private soldiers. Every raw recruit has to be taught the drill of his arm of the service, and made to comprehend the responsibilities which rest upon him, and he too, while acquiring this education, draws his full pay, and if he re-enlists, receives the additional compensation. The argument proves too much, and, therefore, fails.

Besides all this, the Government has never lost anything by the expenditure of money in educating young men at the West Point institution. The graduates of that school, everywhere and under all circumstances, have nobly performed their duty to their country. The alacrity with which the greater number of them, even those in civil life, obeyed the call for their services in the late war, illustrates the advantage to the nation of possessing such a body of educated military men, and the achievements of many of them in that contest, and notably of U. S. GRANT, at Vicksburg, and WM. T. SHERMAN, in his "March to the Sea," brighten and adorn our history.

Are, then, the cadets of the Military Academy "enlisted men," within the meaning of the section under consideration? And this can only be answered by determining their *legal* relation to the army. They are what the stat-

utes make them—nothing more nor less. And it must be clear to every legal mind, from the review of the statutes relating to West Point which I have given, that their legal *status* is that of "enlisted men." It matters not what may be their practical condition—whether they lie upon "downy beds of ease," have servants to black their boots, and wear kid gloves or not—if the law places them in the attitude of soldiers, they must be so considered in the solution of the question now before the court. The whole confusion which exists upon the subject grows out of the idea entertained in relation to the definition of the word *cadet*, and in ascribing to it a meaning to which it is not entitled. Thus, the Solicitor-General, in the opinion I am reviewing, says: "Whatever may be said as to the virtual effect of the process by which civilians become cadets, its technical, specific name is not *enlistment* but *admission*; and in the same way, after admission, they are not *men* but *cadets*;" as though the latter title gave them a military position different from that of enlisted men. It may be well, then, to ascertain the definition of the word, as furnished by our best lexicographers. Worcester gives it three meanings: "*Cadet.* 1. The youngest brother; 2. A volunteer in the army, who serves in expectation of a commission—so applied in Germany; 3. *A young man in a military school.*" Webster also gives it three definitions as follows: "*Cadet.* 1. The younger of two brothers; the youngest son; 2. A gentleman who carries arms in a regiment as a *private man*, with a view to acquire military skill and obtain a commission; his service is voluntary, but he receives pay, and thus is distinguished from a volunteer; 3. *A young man in a military school.*" These definitions of the word from the two standard authorities upon the subject in this country, must be deemed conclusive, and show that the word is used properly mainly to indicate a student or pupil at a military institution, and that if he possesses any military rank, it is only that of a

private. And in this sense, and no other, is it used in the statutes. We all know, in point of fact, that at all the military academies in this country, whether under State or individual control, the pupils are designated as cadets, and that the term has no other meaning than that given to it by Worcester and Webster. Our statutes are thus in harmony with the ordinary use of the word in every-day life; and until a provision of law can be produced which gives it a different definition, or which confers some rank or grade upon the person holding it, a cadet can only be regarded as a *student* at the Military Academy, leaving his position in the army to be determined by the statutes. Giving the word cadet its true interpretation, all idea of the students at West Point being "warrant officers," as Mr. Cushing called them, or invested with any other rank, is at once dispelled, and they are left to stand in the attitude either of civilians or soldiers; and inasmuch as they are governed by military law, they can only be placed in the latter category. To decide that the cadets are not "enlisted men," is to displace them from the army, when the law expressly declares that the "Army of the United States shall consist of * * * *and the professors and corps of cadets of the United States Military Academy.*" Rev. Stat., sec. 1094.

This conclusion is strengthened by another view of the subject. As I have already stated, and as the Solicitor-General concedes, both sections two and seven of the act relate to two classes of men—those who had served in the volunteer forces as officers, and those promoted from the ranks of the regular or volunteer forces. In the seventh section, the officers there spoken of must "*have served as officers in the volunteer forces during the war of the rebellion,*" to obtain the benefit which that section confers, and the section is limited to officers of this class. But as to the enlisted men, whether in the regular or volunteer forces, this section applies no such limitation. In other words

enlisted men in either force, appointed officers in the regular army, need *not* to have "served during the war of the rebellion," in order to be credited with the full time of their service as enlisted men in computing their longevity pay. This language plainly shows that the section is of wider scope than the Solicitor-General imagined, and covers soldiers who did not thus serve. Now, the only enlisted men in the army who did not serve "during the war of the rebellion"—that is to say, *in the field as soldiers*, for that is what the phrase means—were the cadets at West Point, and the inference is plain that the section was framed with reference to this fact, and so as not to exclude the cadets from the benefits of the statute. If the section contained the same limitation in regard to enlisted men, that it applies to officers in the volunteer forces, there can be no doubt but the students of the Military Academy would be excluded from its provisions. If Congress, well knowing that the cadets had not served in the army in the field during the war of the rebellion, had intended to exclude them, and make them an exception to a rule which applies to every officer in the army, it would have said so in plain and explicit language. Instead of that, it employs language broad enough to include them, which is free from ambiguity, and no court can rightfully, if it regards the rules governing the construction of statutes, by construction limit the effect of that language. Nor is there anything that militates with this view in the distinction attempted to be established by the Solicitor-General, in the phrase, "promoted from the ranks," in section two, and the phrase "enlisted men in the armies of the United States," in section seven. All enlisted men are legally "in the ranks," whether non-commissioned officers or privates, and the terms are, in military parlance, synonymous. A sergeant or corporal who receives a commission, is as much promoted from the ranks as a private; the cadets of the Military Academy, when formed into

companies as the law requires, are as much in the ranks as any other enlisted men; the only military duties they perform are performed as soldiers in the ranks; and when, after graduation, they receive commissions as second lieutenants they are as much promoted from the ranks as are other soldiers.

And this brings me to a brief consideration of the opinion of the Court of Claims in this case. Judge Davis, who delivered the opinion, says: "It is demonstrable that the phrase "enlisted men" is used in section one of that act (the act of June 18, 1878,) in a sense which excludes cadets." He then proceeds to his demonstration by citing a part of said section one, as follows: "No money appropriated by this act shall be paid for recruiting the army beyond the number of 25,000 enlisted men, including Indian scouts and hospital stewards; by referring to the army appropriation act of 1870; and by citing a portion of General Order No. 23, issued in 1871, under the act of 1870, which reads as follows:

Under the foregoing act the following will be the organization of the Army from and after July 1, 1871: "Enlisted men of engineers, 301; enlisted men of ordnance, 475; ordnance sergeants at posts, 200; Military Academy band, 24; 60 enlisted men per company for 55 companies of artillery, 3,300; 84 enlisted men per battery for 5 batteries of light artillery, 420; 84 enlisted men per company for 120 companies of cavalry, 10,080; 60 enlisted men per company for 250 companies of infantry, 15,000; non-commissioned staff of regiments, 200; total, 30,000. The rate of enlisted men per company is to include non-commissioned officers and all other grades." (Scott's Digest, §504, n. 12.)

Pursuing his demonstration, the judge then says:

Departmental estimates were made on the basis of this order, and were sent to Congress; and appropriations were made on the basis of the estimates until the session of 1873–'4,

except that a special provision in regard to Indian scouts was made in 1871. During this whole period the usual separate annual appropriation was made for the cadets and the Academy.

By the appropriation act of June 16, 1874, it was provided that "no money appropriated by this act shall be paid for recruiting the army beyond the number of 25,000 enlisted men, including Indian scouts." (18 Stat. L., 72.) The appropriation act of the next year repeated this provision, except that hospital stewards were added to Indian scouts as included within the 25,000 enlisted men. (18 Stat. L., 452.) This form has been since retained (19 Stat. L., 97; 20 Stat. L., 146), and is identical with what we find in the act of June 18, 1878. The appropriations for the support of the Academy continue to be separate. (18 Stat. L., 59, 466; 19 Stat. L., 124, 380.)

And then he concludes:

The conclusion is irresistible that the term "enlisted men," in section 1 of the act of June 18, 1878, refers only to the classes embraced in the General Order No. 23 and to Indian scouts and hospital stewards, and does not include cadets. This raises a controlling presumption that the same phrase is used in the same sense in section 7; for the rule is well settled that if the same words occur in different parts of a statute they must be taken to have been everywhere used in the same sense when applied to the same subject matter. (Dwarris on Statutes, 574.)

This is the foundation upon which the whole opinion rests, and the inference sought to be drawn is, that General Order No. 23 covers all the enlisted men in the Army; and, therefore, as the cadets of West Point are not mentioned in said order, they are not regarded as enlisted men by the authorities of the War Department or the legislative department of the Government. And herein lies the great error into which the court has fallen. General Order No. 23 only covers a certain portion of the army, and was only intended to include

those officers and men for whose payment and support provision is uniformly made in the general army appropriation bill. By reference to the order, it will be seen at once, that it does not include the professors at West Point; nor the artillery or cavalry force stationed there, numbering some 300 men; nor the general service detachments at recruiting depots; nor the men employed in the signal service; nor commissary sergeants, all of whom, with the exception of the professors at West Point, are enlisted men. The order in fact, only embraces what may be called the army proper, or the army in the field, and which was limited by the general army appropriation bill. It does not include other branches of the army, as the West Point Academy, which are usually provided for in separate appropriation bills, and with this understanding, it will be at once apparent that the order has no bearing upon the question at issue; and it cannot be used, therefore to give a construction to the term, "enlisted men" as used in the act of June 18, 1878, nor does the "presumption" arise, therefrom, "that the same phrase is used in the same sense in section seven" of that act. If I am right in this view, as I believe I am, it follows that the opinion of the court below is based upon a misapprehension, and being so, it must consequently be erroneous.

But if any doubt existed as to the intention of Congress by the enactment of the 7th section of the act of June 18, 1878, or as to the construction to be given to that section, that doubt has been removed by subsequent legislation. The act of February 24, 1881, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1882, and for other purposes," in the first section, under the head of Pay Department, expressly provides: "Additional pay to officers for length of service to be paid with their current monthly pay, *and the actual time of service in the army or navy, or both, shall be allowed* ALL *officers in computing their pay.*"

Singularly enough the Court of Claims holds with reference to this act that "if the claimant's construction of the act of 1878 is correct, this legislation is unnecessary, since cadets are part of the army, and as such, in the military service." But the court failed to see that even though the claimant might be mistaken as to the construction of section seven of the act of June 18, 1878, *there could be no doubt but that he was entitled to the additional pay for length of service claimed in this suit, under the act* of February 24, 1881, *and that the act being retroactive in its nature, it applied to the then pending suit.* The court appears to have been ignorant of the fact that the above-quoted provision from the act of 1881, was inserted therein to reverse and nullify the opinion of Solicitor-General Phillips, upon which I have commented, adverse to the graduates of West Point, and to sustain the construction which the War Department had placed upon the statute of 1878, by giving in the Army Register the period of service at West Point as a part of each graduate's military career. The object of this provision in the act of 1881, was to make clear what had been rendered doubtful by the narrow ruling of the law department of the Government, and hence, the law says that "ALL officers," leaving out the question whether they had been enlisted men or not, "in computing their pay," "shall be allowed" "the actual time of service in the army or navy, or both." Now, as it is conceded by the court below, as well as by the law department, that the cadets at West Point "are a part of the army, and as such, in the military service," the act of 1881 covers them, and was designed for their benefit as well as all the other officers of the army entitled to longevity pay, so that, independent of the act of 1878, the decision of the court should have been in favor of the claimant under the act of 1881. Indeed this act can apply to no other officers than the graduates of West Point, for the reason, as I have shown in the course of

this argument, that the 7th section of the act of 1878, reaches all the other officers entitled to longevity pay, even if it should be held not to benefit the West Point graduates.

And this brings me to the close of the argument. I have given the question as thorough an examination as was possible, and have been irresistibly led to the conclusions herein stated, viz.:

1. That the *legal status* of the cadets of the Military Academy at West Point is that of enlisted men.

2. That it was the intention of Congress, in enacting the seventh section of the act of June 18, 1878, to establish a uniform rule regulating the computation of longevity pay, thus placing all the officers on the same footing; and

3. That the cadets come within the definition of "enlisted men" as used in that section; and are, therefore, entitled thereby to be credited in computing their longevity pay, with the full time they served at said institution.

4. That even if the foregoing conclusions are erroneous, there can be no doubt but that the appellee is entitled to recover under the act of 1881; and, therefore, that the judgment of the court below should be affirmed.

Respectfully submitted,

W. PENN. CLARKE,
Att'y for Appellee.